

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL IN THE MICHIGAN COURT OF APPEALS

Judges William B. Murphy, Richard Allen Griffin, and Helene N. White

CITY OF TAYLOR,

Plaintiff-Appellee,

v

THE DETROIT EDISON COMPANY,

Defendant-Appellant.

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Supreme Court No. 127580

Court of Appeals No. 250648

Case No. 02-221723-CZ  
Wayne County Circuit Court  
Hon. John A. Murphy

**AMICUS CURIAE BRIEF OF**  
**MICHIGAN PUBLIC SERVICE COMMISSION SUPPORTING APPELLANT**

**MICHIGAN PUBLIC SERVICE COMMISSION**

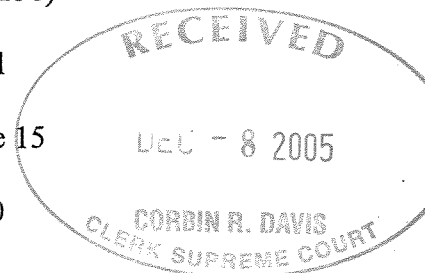
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## **Statement Identifying the Judgments or Orders Appealed from and Indicating Relief Sought**

Appellant, Detroit Edison Company (Detroit Edison), pursuant to MCR 7.302(A), filed an Application for Leave to Appeal (Application) the September 14, 2004 Court of Appeals opinion in *City of Taylor v The Detroit Edison Co.*<sup>1</sup> The Court of Appeals held that the doctrine of primary jurisdiction did not require the Wayne Circuit Court to defer to the Michigan Public Service Commission (MPSC or Commission) in a lawsuit initiated by the City of Taylor (Taylor) against Detroit Edison regarding the relocation of existing overhead electric wires underground as required by Taylor city ordinance. This Court granted Detroit Edison's Application for Leave to Appeal by order entered October 12, 2005.

The MPSC urges this Court to reverse the Court of Appeals and hold that the City of Taylor ordinance, which unilaterally imposes upon the utility the entire cost of relocating existing overhead utility facilities underground, impermissibly intrudes upon the statutory authority of the MPSC to control and supervise the business of transmitting and supplying electricity, and its statutory authority to fix rates for electricity.<sup>2</sup> The Taylor ordinance thus reflects an unreasonable exercise of that city's constitutional authority over the reasonable control of its streets.<sup>3</sup> The Court of Appeals clearly erred in holding that primary jurisdiction doctrine did not require the Wayne County Circuit Court to defer to the administrative expertise of the MPSC, and this Court should reverse that decision.

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<sup>1</sup> *City of Taylor v The Detroit Edison Co*, 263 Mich App 551; 689 NW2d 482 (2004). Attachment A.

<sup>2</sup> MCL 460.552; MCL 460.557(4).

<sup>3</sup> Const 1963, art 7, § 29.



## Questions Presented for Review

- I. Under Const 1963, art 7, § 29 the City of Taylor may exercise reasonable control of its streets. This Court has consistently held that such “reasonable control” is limited to matters of local concern. The City of Taylor ordinance at issue unilaterally requires the Detroit Edison Company to relocate existing overhead utility facilities underground at the utility’s expense. The Michigan Public Service Commission is authorized by statute to control and supervise the business of transmitting and supplying electricity, and to fix rates for electricity. Does such unilateral action by a municipality exceed its constitutional authority over matters of local concern and impermissibly intrude upon the Commission’s state-wide authority to regulate electric utilities?

Appellant The Detroit Edison Company, “Yes.”

Appellee City of Taylor, “No.”

Michigan Public Service Commission *Amicus Curiae*, “Yes.”

- II. The primary jurisdiction doctrine applies to claims that require the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. The Legislature has vested the Michigan Public Service Commission with the authority to control and supervise the business of transmitting and supplying electricity, and to fix rates for electricity. The MPSC has, pursuant to that statutory authority, promulgated rules specifically related to costs associated with replacement of overhead electric lines underground. Did the Court of Appeals err in holding:

- that the doctrine of primary jurisdiction did not require the Wayne Circuit Court to defer to the MPSC in a lawsuit initiated by the City of Taylor against Detroit Edison relating to the relocation of existing overhead electric wires underground; in holding that the Circuit Court action did not present a case requiring the specialized knowledge of the MPSC;
- that Statewide uniformity on a utility issue may be achieved through the state judiciary rather than through the State administrative agency legislatively charged with the power and authority to regulate public utility matters in Michigan;
- that the Circuit Court’s refusal to defer to the MPSC would not adversely affect the performance of the MPSC’s regulatory duties?

Appellant The Detroit Edison Company, “Yes.”

Appellee City of Taylor, “No.”

Michigan Public Service Commission *Amicus Curiae*, “Yes.”

### **Concise Statement of Material Proceedings and Facts**

The facts relevant to this appeal were succinctly summarized by the Court of Appeals<sup>4</sup>:

This case involves a major reconstruction project along the portion of Telegraph Road passing through the city of Taylor. As part of this project, the Taylor city council passed an ordinance directing all persons owning, leasing, operating, or maintaining overhead lines, wires, poles, or facilities to relocate the facilities underground and to remove all the above-ground facilities. The ordinance stated that the relocation was to be done at the expense of the persons owning, leasing, operating, or maintaining the overhead facilities. Notwithstanding the ordinance, defendant maintained that it was not obliged to pay the costs of the relocation. Plaintiff ultimately advanced a portion of the costs to defendant, reserving its right to litigate the issue. Plaintiff commenced this action seeking to enforce the ordinance and to require defendant to pay for the relocation. The parties filed motions for summary disposition. The court granted plaintiff's motion, denied defendant's, and ordered defendant to reimburse plaintiff.

In a published *per curiam* opinion released on September 14, 2004, the Michigan Court of Appeals affirmed the Wayne Circuit Court.<sup>5</sup> Detroit Edison filed a timely application for leave to appeal on December 9, 2004. The Michigan Public Service Commission filed a Motion to File *Amicus Curiae* brief and *Amicus Curiae* brief on March 8, 2005. On October 6, 2005 this Court granted the MPSC's motion, and granted Detroit Edison's application for leave to appeal.

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<sup>4</sup>*City of Taylor v The Detroit Edison Company*, 263 Mich App 551, 554; 689 NW2d 482 (2004). Attachment A, page 1.

<sup>5</sup> *City of Taylor*, 263 Mich App at 566.

## Argument

### **I. A municipality's constitutional authority to exercise reasonable control over its streets does not include the authority to legislatively compel a utility to expend extraordinary costs to relocate utility facilities underground.**

This Court directed the parties to address “what powers the City has over utilities under its constitutional authority to exercise reasonable control over its streets.” This Court also directed the parties to address whether a municipality’s constitutional authority of reasonable control over its streets “allows the City to shift the costs of relocation of utility equipment to the utility.”<sup>6</sup>

#### **A. The constitutional authority of a municipality to exercise reasonable control of its streets is not absolute, and, while a city may exercise its reasonable authority in matters of purely local concern, it must nonetheless yield to the superior power of the State in the control and supervision of the business of transmitting and supplying electricity and the fixing of rates for electricity.**

A municipality’s constitutional authority to exercise reasonable control over its streets is expressly provided in Const 1963, art 7, § 29:

No person, partnership, association or corporation, public or private, operating a public utility shall have the right to use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, poles, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

The predecessor to this provision, Const 1908, art 8, § 28 also granted cities authority to exercise reasonable control of their streets:

No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; not to transact a local business therein without first obtaining a franchise therefore from such city, village or township. The right of all cities, villages and townships

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<sup>6</sup> *City of Taylor v The Detroit Edison Co*, 474 Mich 877; 704 NW2d 75 (2005).

to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships.

“Reasonable control” was vigorously debated in the Constitutional Convention of 1909 and was inserted late in deliberations<sup>7</sup>:

The word “reasonable” was inserted to place a limitation upon the authority cities, villages and townships may exercise over the streets, alleys, highways and public places within their corporate limits. And it was pointed out in the debates that without the word “reasonable” or a similar qualification the section would practically deprive the State itself of authority over its highways and public places.

Most of the cases challenging Const 1963, art 7, § 29 and its predecessor concern what powers a city has over utilities under its constitutional authority to exercise reasonable control over its streets.

This Court recognized, in *City of Detroit v Michigan Public Service Comm*, that the power to regulate the rates of public utilities is not “essential to local self-government.”<sup>8</sup> This Court held that municipal corporations do not possess legislative power to fix charges to be made by public utility companies<sup>9</sup>:

Municipal corporations can establish rates by contract and franchise but they have not legislative power to fix charges to be made by public utility companies. The primary authority to fix such rates is in the legislature. The legislature may delegate such power to municipality, but only in express terms or by necessary implication, and art 8, § 28, Const, does not provide for such a delegation of power to cities. [Citations omitted.]

This Court has additionally held that the Legislature had provided the Railroad Commission [predecessor of the current MPSC] with legislative power that superceded the

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<sup>7</sup> *People v McGraw*, 184 Mich 233, 237; 150 NW 836 (1915), quoting Proceedings and Debates of the Constitutional Convention, Volume 2, page 1433.

<sup>8</sup> *City of Detroit v Michigan Public Service Comm*, 288 Mich 267, 277; 286 NW 368 (1939), citing *City of Kalamazoo v Titus*, 208 Mich 252, 265; 175 NW 480 (1919).

<sup>9</sup> *City of Detroit*, 288 Mich at 287.

implied permissive authority of the city to contract for rates as a condition of the use of its rights-of-way.<sup>10</sup>

In *Detroit, Wyandotte & Trenton Transit Co v City of Detroit*, this Court examined the City of Detroit's power to adopt an ordinance under Const 1908, art 8, § 28, prohibiting the operation of jitneys on streets.<sup>11</sup> The ordinance was adopted before the enactment of 1931 PA 212 and 1931 PA 312, but this Court framed the issue in terms of the "application of the doctrine of 'occupation of a field' of legislation by the superior power".<sup>12</sup> This Court found that by enactment of 1931 PA 212 and 1931 PA 312 the State had jurisdiction over all carriers of person or property for hire.<sup>13</sup> The Court then analyzed whether the legislative authority infringed upon the constitutional right of the city to have reasonable control of its streets<sup>14</sup>:

The State having acted, it must be assumed, and this record discloses, that it has undertaken to and does occupy the whole field relative to regulating motor vehicles as common carriers on the highways of the State, subject only to the constitutional limitation or reservation above quoted. In testing the validity of the ordinance under consideration it must therefore be ascertained whether the city has exceeded the power reserved to it by the constitutional provision and to what extent, if at all, the defendant city by enacting the ordinance has invaded the field or control of motor vehicle carriers already undertaken by the State.

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<sup>10</sup> *Boerth v Detroit City Gas Co*, 152 Mich 654; 116 NW 628 (1908), *Kalamazoo v Kalamazoo Circuit Judge*, 200 Mich 146; 166 NW 998 (1918), *City of Kalamazoo*, 208 Mich at 252, *Traverse City v Citizens' Telegraph*, 195 Mich 373; 161 NW 983 (1917) and *Traverse City v Michigan Railroad Comm*, 202 Mich 575; 168 NW 481 (1918).

<sup>11</sup> *Detroit, Wyandotte & Trenton Transit Co v City of Detroit*, 260 Mich 124; 244 NW 424 (1932).

<sup>12</sup> *Detroit*, 260 Mich at 128, citing *Chicago & N.W.R. Co v Michigan Public Utilities Comm*, 233 Mich 676; 208 NW 62 (1926); and *Napier v Railroad Co*, 272 US 605; 47 S Ct 207 (1926).

<sup>13</sup> *Detroit*, 260 Mich at 127-128.

<sup>14</sup> *Detroit*, 260 Mich at 128, quoting *North Star Line, Inc v City of Grand Rapids*, 259 Mich 654; 244 NW 192 (1932).

This Court concluded that the ordinance prohibiting the operation of a specific kind of motor vehicle was *prima facie* an invasion of the State's jurisdiction under 1931 PA 212 and 1931 PA 312<sup>15</sup>:

The legislative authority cannot infringe upon the constitutional right of the city to reasonable control of its streets. Nor do Acts Nos. 212 and 312 purport to do so. On the contrary, section 17 of Act No. 212 and section 12 of Act No. 312, expressly preserve such local control. But the enactment of statutes had the effect of withdrawing from the city all authority over carriers covered by them, except such power as is strictly referable to reasonable control of the streets or as is reserved to it by law.

\* \* \*

It is apparent that an ordinance prohibiting the operation of specified kinds of motor vehicle on city streets, the carriers not doing a local business, *prima facie* is an invasion of the State's jurisdiction over them and is invalid.

The Michigan Court of Appeals, in analyzing a line of cases that included *City of Detroit v Detroit United Railway*, *Maybury v Mutual Gas-Light Co*, *Union Township v Mt. Pleasant*, and *North Star Line v Grand Rapids*, looked to the activity being conducted on a city's right-of-way and summarized the holdings of these case as reflecting a limitation on the city's reasonable control of its streets<sup>16</sup>:

The gist of these cases is that where the activity being conducted on a city's rights-of-way is purely local, the city retains broad authority over the terms of its consent, although it may not unilaterally impose a fee after a grant of consent has expired. However, where the legislature has occupied the field, a city retains only such power as is strictly referable to the reasonable control of its streets, which does not include the power to prohibit the activity; and if the city charges a fee, that fee must be based on the expense to the city of issuing a license and of supervising the activity, if supervision is required. Even where the consent of the

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<sup>15</sup> *Detroit*, 260 Mich at 127.

<sup>16</sup> *TCG Detroit v City of Dearborn*, 261 Mich App 69, 93-94; 680 NW2d 24 (2004), discussing *City of Detroit v Detroit United Railway*, 172 Mich 136; 137 NW 645 (1912), *Detroit, Wyandotte, & Trenton Transit Co v Detroit*, 260 Mich 124; 244 NW 424 (1932), *Maybury v Mutual Gas-Light Co*, 38 Mich 154; 1878 Mich LEXIS 24 (1878), *Union Township v Mt. Pleasant*, 381 Mich 82; 158 NW 905 (1968) and *North Star Line v Grand Rapids*, 259 Mich 654; 244 NW 192 (1932).

city is required, as where pipe is to be laid in a right-of-way, consent cannot be refused arbitrarily or unreasonably.

Guided by these cases, the Court of Appeals, in *TCG Detroit v City of Dearborn*, examined whether the legislative powers of the state could limit the amount of money a city was permitted to charge a telecommunications company as a condition of consent to lay conduit under its streets.<sup>17</sup> The Court focused on the “reasonable control” clause of Const 1963, art 7, § 29, and held that a city’s right of reasonable control “are subject to the superior powers of the state”<sup>18</sup>:

When focusing on the third clause regarding reasonable control, the source of the power to set fees is the same as the source of the power to set rates; it is an implied administrative power based on the right of reasonable control. Neither the power to set fees nor the power to set rates is expressly granted to local units of government. The state’s powers are broad, and the local government’s power under the third clause (reasonable control) are subject to the superior powers of the state, even when the rates are otherwise reasonable. Because both powers are implied and the source of the powers is the same, we conclude that there is no reason to distinguish Dearborn’s power to set fees under the reasonable-control clause from its power to set rates under that clause. Both are subject to the control of the Legislature.

As with rates, there is no express legislative grant of the power to fix fees other than by contract. Since the Constitution does not expressly grant that right to the cities, it remains with the state, and is subject to the state’s control if exercised. Just as the state has the power to set rates, and thereby set the outside parameters of a city’s powers to contract, it has the power to set the fees that can be charged nonlocal businesses, and the imposition of a fixed and variable cost fee structure does not impinge on a city’s right to the reasonable control of its streets.

The Court of Appeals, after analyzing this Court’s decisions regarding “reasonable control”, held that the right of “reasonable control” did “not include the power to legislate regarding the cost of consent”<sup>19</sup>:

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<sup>17</sup> *TCG*, 261 Mich App at 94.

<sup>18</sup> *TCG*, 261 Mich App at 95.

<sup>19</sup> *TCG*, 261 Mich App at 107.

We conclude that although it is an open question whether the MTA impermissibly compelled a local unit of government to grant consent in violation of Const 1963, art 7, § 29, that issue is not before us. Dearborn has maintained that the issue is the compensation it may exact from TCG, not whether it can withhold its consent altogether and prevent TCG from any use of its right-of-way. With regard to this issue, we conclude that Const 1963, art 7, §29 does not grant a local unit of government the right to be free from legislative limitations on the amount it can charge for the use of its rights-of-way. The right to withhold consent is simply that; it does not include the power to legislate regarding the cost of consent.

**B. In matters that impact upon the control and supervision of the business of transmitting and supplying electricity, and the fixing of rates therefore, a municipality may not unilaterally, and to the exclusion of the MPSC, impose upon a utility the cost of permanently relocating utility equipment.**

The City of Taylor’s attempt to compel a utility, by ordinance, to absorb the cost of relocating existing utility lines underground is impermissible because its ordinance directly conflicts with the MPSC’s broad regulatory authority over utilities.<sup>20</sup> The Court of Appeals erroneously held that the extensive statutory authority of the MPSC to regulate utilities did not preempt Taylor from passing an ordinance in direct conflict with MPSC Underground Electric Line Rules.<sup>21</sup>

While, under Const 1963, art 7, § 29, the City of Taylor has the power to adopt resolutions and ordinances relating to the business of the municipality, the Legislature has reserved to municipalities only the right to the “reasonable control of its streets, alleys and public places in all matters of mere local concern.”<sup>22</sup> When a municipality, however, passes an ordinance attempting to regulate a matter under the jurisdiction of a State agency, such as in this

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<sup>20</sup> *In the matter of the investigation on the Commission’s own motion to determine the need for, and the provisions of, a uniform underground electric extension policy for electric utilities*, Electric Rules Order, Case No. U-3001, dated August 10, 1970. Attachment B. 1979 AC, R 460.516

<sup>21</sup> *City of Taylor v The Detroit Edison Co*, 263 Mich App 551; 689 NW2d 482 (2004).

<sup>22</sup> MCL 460.553.



case, the court must examine whether the provisions of the ordinance are “preempted” by State law.<sup>23</sup>

This Court, in *People v Llewellyn*, established the test to determine whether a State has preempted an area of law a municipality seeks to regulate<sup>24</sup>:

A municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme pre-empts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation.

The *City of Taylor* was precluded from enacting its ordinance under either test of *Llewellyn*.

1. **The City of Taylor ordinance is in direct conflict with the state statutory scheme providing for state control and supervision of the business of transmitting and supplying electricity, the fixing of rates therefore, and the rules promulgated by the state administrative agency legislatively authorized to regulate utilities in this state.**

The City of Taylor’s ordinance requires Detroit Edison to relocate underground “all electric utility, cable, television, telecommunications, traffic signal and other overhead lines, wires and the removal of poles and other related overhead equipment and facilities along Telegraph Road in the City of Taylor, Michigan.” Section 3 of the ordinance requires Detroit Edison to pay for all costs of relocating overhead utility lines underground upon order from the City to relocate the lines underground<sup>25</sup>:

Relocation Directed. Upon the adoption of this Ordinance and upon written notice from the City, all public utilities, telecommunication providers, cable television providers (collectively the “Companies”), state and county agencies

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<sup>23</sup> *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902 (1977), *cert den* 435 US 1008; 56 L Ed 2d 389; 98 S Ct 1879 (1978).

<sup>24</sup> *Llewellyn*, 401 Mich at 322 (citations and footnotes omitted).

<sup>25</sup> *City of Taylor*, Michigan Code of Ordinances, Chapter 28, Streets, Sidewalks, and Other Public Places, Article VII, Telegraph Road Improvement and Underground Relocation of Overhead Lines, Section 3, Relocation Directed. (Ordinance No. 00-334). Attachment C.

(“Agencies”) and all other individuals, firms, partnerships, associations, companies, corporations, or entities who own, lease, operate and/or maintain overhead lines and wires, poles and/or related overhead facilities equipment located along, across over and/or adjacent to Telegraph, Telegraph intersections and to private property adjacent to Telegraph, are hereby directed and ordered to begin immediately to relocate underground all of their overhead lines and wires and remove all poles and related overhead facilities equipment at their sole cost and expense and at no cost or expense to the City.

Under the first standard set forth in *Llewellyn*, a municipality may not enact an ordinance that directly conflicts with a state statutory scheme.<sup>26</sup> In this case, the City of Taylor ordinance is in direct conflict with the state statutory scheme related to the regulation of electric utilities and the rules promulgated thereunder, specifically: the Electric Transmission Act<sup>27</sup> and amendments to the act creating the public service commission;<sup>28</sup> statutes that authorize the MPSC to fix electric rates;<sup>29</sup> in statutes providing for customer choice in electricity;<sup>30</sup> and statutes providing for the promulgation of rules by the Commission.<sup>31</sup>

Pursuant to this statutory authority, the Commission established, through the rulemaking procedures of the Administrative Procedures Act, a uniform electric underground extension policy for public utilities subject to Commission jurisdiction.<sup>32</sup> “The adoption of a rule by an agency has the force and effect of law”.<sup>33</sup> The Commission sent an official notice of its proposed rulemaking to “all municipalities within the state, to all electric and telephone utilities, and to all

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<sup>26</sup> *People v Llewellyn*, 401 Mich at 322.

<sup>27</sup> 1909 PA 106, MCL 460.551 *et seq.*

<sup>28</sup> 1939 PA 3, MCL 460.1 *et seq.*

<sup>29</sup> 1982 PA 212, MCL 460.6a.

<sup>30</sup> 2000 PA 141, 142, MCL 460.10 *et seq.*

<sup>31</sup> 1981 PA 8, MCL 460.551(6).

<sup>32</sup> Electric Rules Order, Attachment B, page 1.

<sup>33</sup> *Danse Corp v City of Madison Heights*, 466 Mich 175, 183; 644 NW2d 721 (2002), quoting *Coalition for Human Rights v DSS*, 421 Mich 172, 177; 364 NW2d 609 (1988).

other parties who had evidenced an interest in the matter.<sup>34</sup> The Commission found, after presentation of testimony and evidence, that it was in the public interest to establish a uniform statewide policy regarding underground electric facilities based on the following considerations<sup>35</sup>:

- A. There is wide public interest in, and public support for, a compulsory policy of undergrounding electric utility facilities in the state of Michigan.
- B. The present technology and the economies involved with the burial of electric transmission lines would limit any compulsory burial of electric facilities to distribution lines and service laterals.
- C. The burial of electric facilities increases the utility's rate base and its cost of rendering service to its customers.
- D. Overhead electric construction is the standard method of serving electric customers at the present time and it would not be reasonable to charge higher rates to the vast majority of customers served from overhead systems in order to provide underground electric facilities for the relatively few customers to be served through underground facilities in the immediate future.
- E. Those who benefit directly from the burial of electric facilities should make a contribution in aid of construction to the utility in an amount equal to the estimated difference in cost between the standard overhead facilities and the generally more aesthetic underground facilities.
- F. All electric distribution facilities constructed in the new residential subdivisions in the mainland lower peninsula of Michigan and all electric distribution facilities constructed to serve commercial customers in the mainland lower peninsula of Michigan should be placed underground.
- G. All distribution facilities in the balance of the state of Michigan could be placed underground at the option of the customer.
- H. The Rules and Regulation Governing the Extension of Underground Electric Distribution Lines, attached hereto as Exhibit A, is in agreement with the above findings.
- I. It is in the public interest to approve the Rules and Regulations Governing the Extension of Underground Electric Distribution Lines, attached hereto as Exhibit A.

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<sup>34</sup> Electric Rules Order, Attachment B, page 1.

<sup>35</sup> Electric Rules Order, Attachment B, pages 2-3.

Specifically, MPSC R 450.516 provides that the cost differential between replacing overhead utility lines with overhead lines and replacing overhead utility lines with underground facilities shall be paid for by the customer or customers opting to relocate overhead utility lines underground<sup>36</sup>:

R 460.516 Replacement of existing overhead lines.

Rule 6. (1) Existing overhead residential, commercial and industrial electric distribution and service lines anywhere in the state shall be replaced with underground facilities at the option of the affected customer or customers.

(2) Before construction is started, the customer shall be required to pay the utility the depreciated cost (net cost) of the existing overhead facilities plus the cost of removal less the salvage value thereof and, also, make a contribution in aid of construction in an amount equal to the estimated difference in cost between new underground and new overhead facilities including, but not limited to, the costs of breaking and repairing streets, walks, parking lots and driveways, and of repairing lawns and replacing grass, shrubs and flowers.

The City of Taylor's ordinance directly conflicts with Rule 460.516 because it directs the utility to bear the entire cost of converting existing overhead facilities to underground facilities in contravention of the MPSC rule. Consequently, the City of Taylor's ordinance is preempted under *Llewellyn*.

This Court, in *American Federation of State County and Municipal Employees (AFSCME) v City of Detroit and Detroit Housing Commission (DHC)*, applied *Llewellyn* to determine whether the State Housing Facilities Act preempted a City of Detroit ordinance.<sup>37</sup> AFSCME sued the City of Detroit for "declaratory relief concerning whether the Housing Facilities Act gave the city the power to divest itself of the DHC and to sever its relationship with DHC employees".<sup>38</sup> This Court examined whether certain sections of the Detroit City Code

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<sup>36</sup> Electric Rules Order, Attachment B.

<sup>37</sup> *American Federation of State, County and Municipal Employees (AFSCME) v City of Detroit Housing Comm*, 468 Mich 388, 394; 662 NW2d 695 (2003).

<sup>38</sup> *AFSCME*, 468 Mich at 394.

were in direct conflict with the Housing Facilities Act, and therefore preempted.<sup>39</sup> The Housing Facilities Act specifically provided that housing commissions were authorized to “employ and fix the compensation of their directors, officers, and other employees and to prescribe the duties of those persons.”<sup>40</sup> The Detroit ordinance, however, required all housing commission employees to be either classified or unclassified employees with all rights of City of Detroit employees.<sup>41</sup> This Court concluded that the Housing Facilities Act preempted the Detroit ordinance because the ordinance was in direct conflict with the Housing Facilities Act.

In this case, the City of Taylor ordinance directly conflicts with an agency rule designed to ensure statewide uniformity, compliance with state safety standards, and cost assignment to the relocation of overhead utility facilities underground.<sup>42</sup> In addition, the MPSC also approved Detroit Edison’s Tariff No. 9, Original Sheet No. B3-7, R B-3.4(f) that requires that modifications to utility facilities must be done in accordance with the requirements of Rule 460.516<sup>43</sup>:

The company will not undertake the replacement of existing overhead lines and above-surface equipment with underground installations or provide underground installations for transmission lines, sub transmission lines, distribution feeders and above-surface electrical equipment associated with switching stations except where agreements for reimbursement are made in accordance with MPSC R-460.516, “Replacement of Existing Overhead Facilities,” Rule 6.

The tariff provision demonstrated that compliance with the MPSC rule is an integral part of the regulating scheme developed and administered by the MPSC. The Court of Appeals erred when

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<sup>39</sup> *AFSCME*, 468 Mich at 411.

<sup>40</sup> *AFSCME*, 468 Mich at 392.

<sup>41</sup> *AFSCME*, 468 Mich at 411, citing *Llewellyn*, 401 Mich at 322.

<sup>42</sup> Electric Rules Order, Attachment B.

<sup>43</sup> Detroit Edison Tariff No. 9, Original Sheet No. B3-7, R B-3.4(f). Attachment D.

it concluded that no conflict existed between the MPSC's rules and the City of Taylor's ordinance.

**2. The state statutory scheme involving regulation of electric utilities occupies that field of regulation to the exclusion of the City of Taylor ordinance.**

While this Court should find that the City of Taylor's ordinance is preempted because it directly conflicts with Rule 460.516, it may also find that the ordinance is preempted under the second test of *Llewellyn*. Because of the pervasive nature of state regulation of public electric utilities, exclusive State regulation is necessary to serve the State's interest. *Llewellyn* provides guidance for determining whether preemption of the City of Taylor's ordinance would be appropriate<sup>44</sup>:

First, where the state law expressly provides that the state's authority to regulate in a specific area of the law is to be exclusive, there is not doubt that municipal regulation is pre-empted. *Noey v Saginaw*, 271 Mich 595; 261 NW2d 88 (1935).

Second, pre-emption of a field of regulation may be implied upon an examination of the legislative history. *Walsh v River Rouge*, 385 Mich 623; 189 NW2d 318 (1979).

Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. *Grand Haven v Grocer's Cooperative Dairy Co.*, 330 Mich 694, 702; 48 NW2d (1951); *In re Lane*, 58 Cal. 2d 99; 22 Cal Rptr 857; 372 P2d 897 (1962); *Montgomery County Council v Montgomery Ass'n, Inc.*, 274 Md 52; 333 A2d 112, 33 A2d 596 (1975). While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of preemption.

Fourth, the nature of the regulated subject may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. [Footnotes omitted.]

In *Llewellyn*, this Court held that the state statutory scheme governing criminal obscenity preempted the City of East Detroit's anti-obscenity ordinance because the state statutory scheme that defined and prohibited obscenity offenses "occupied the field" that East Detroit sought to

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<sup>44</sup> *People v Llewellyn*, 401 Mich at 323-325.

regulate. This Court ruled that the City of East Detroit could not establish its own definition of and standards for obscenity because the “[s]tatewide definition of obscenity allow[ed] for both vigorous, effective local prosecution under state law and the protection of legitimate freedom of expression.”<sup>45</sup>

Applying the *Llewellyn* guidelines to this case, the State’s statutory scheme and rules governing the replacement of existing overhead utility facilities underground thoroughly regulates the subject matter of the City of Taylor ordinance, and ensures that any extraordinary costs incurred in such relocation do not result in unjust or unreasonable rates for all ratepayers. The Legislature, through the enactment of this comprehensive statutory scheme, has expressly indicated its intent to vest the State with “plenary control” over the subject matter of public utilities. The MPSC completely occupies the field of regulation of public utilities through quasi-judicial and quasi-legislative authority conferred upon it by the Legislature through the enactment of multiple statutes.<sup>46</sup> Specifically, through its enactment of MCL 460.6; MCL 460.55; MCL 460.57 and MCL 460.557 and the subsequent adoption by the MPSC of R 460.516 and Detroit Edison Tariff No. 9 the Legislature established a pervasive regulatory scheme that regulates, among other things, the relocation of existing overhead utility lines underground.

The comprehensive statutory scheme and the nature of the regulation of the cost of relocating overhead utility lines underground requires exclusive state uniformity necessary to

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<sup>45</sup> *People v Llewellyn*, 401 Mich at 319.

<sup>46</sup> Public Service Commission Act, 1919 PA 419; Carriers by Water Act, 1921 PA 246; Certificate of Convenience and Necessity for New Gas or Electric Projects Act, 1929 PA 69; Transmission of Electricity Through Highways Act, 1909 PA 106; Electric Transmission Line Certificate Act, 1995 PA 30; Motor Carrier Act, 1933 PA 254; Motor Safety Carrier Act, 1963 PA 181; Oil, Gas and Bring Lines Control and Regulation Act, 1929 PA 16; Emergency Telephone Service Enabling Act, 1986 PA 32; Michigan Telecommunications Act, 1991 PA 179.

serve the State's interest in setting just and reasonable utility rates.<sup>47</sup> The City of Taylor ordinance impacts the MPSC's statutory authority to set lawful and reasonable electric utility rates because it usurps the Commission's ability to regulate and control the utility's costs of burying overhead utility facilities. If all the cities, townships and villages in Michigan enacted their own ordinances mandating that the utilities pay for the burial of existing overhead utility lines, there could be a multitude of applications to the MPSC from utilities to increase rates to cover the extraordinary expense of burying such facilities.

The nature and scope of the MPSC's authority clearly favors preemption. The MPSC's enabling statutes provide a mechanism for regulating rates, reliability and safety standards, among others. Rule 460.516 specifically provides the party seeking to relocate existing overhead utility facilities underground to bear the cost of such relocation. Municipalities should be prohibited from passing varying ordinances that contradict the uniform rule of the MPSC. The degree of regulatory authority granted to the MPSC far exceeds cases where "the mere existence of a statute preempts local regulation of the same matter."<sup>48</sup> The entire Legislative statutory scheme manifests the Legislature's intent to regulate and control public utility matters and to occupy the field that the City of Taylor ordinance attempts to regulate. Consequently, the City of Taylor's ordinance is preempted under the second *Llewellyn* test.

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<sup>47</sup> Detroit Edison Application, pages 34-38.

<sup>48</sup> *Rental Property Owners Ass'n of Kent County v City of Grand Rapids*, 455 Mich 246, 261; 566 NW2d 514 (1997).



**C. Existing case law and existing statutes demonstrate how a municipality's constitutional right to exercise reasonable control of its streets has historically been reconciled with the broad authority of the MPSC to regulate utilities, and the decision of the Court of Appeals reflects a marked departure from the balance traditionally struck by the courts between those interests.**

This Court has determined, based on Const 1963, art 7, § 29, that a municipality, in performing a governmental function, may under certain circumstances require the utility to relocate its facilities at the utility's expense.<sup>49</sup> This Court has not, however, extended this holding to the relocation of existing overhead utility facilities underground at a considerably greater cost than merely relocating the facilities to a new overhead location.<sup>50</sup>

More than fifty years ago in *Detroit Edison Company v City of Detroit*, this Court held that Detroit Edison would pay for the expense of temporary removal and replacement of Detroit Edison's electric poles to facilitate the installation of a city sewer because the utility's easement was a "public place" subject to city's right of reasonable control.<sup>51</sup> Likewise, this Court examined the easement rights of the utility and whether the utility was entitled to compensation when directed to remove the poles from the easement.<sup>52</sup> In *Detroit v Michigan Bell Co*, this Court held that the City was not required to pay the relocation costs because the pole and attached wires were not necessary to insure continuity of service. Both of these cases involved the temporary removal or replacement of overhead utility facilities, and represented a reasonable exercise of control by a municipality over its streets.

Although a municipality retains the right to exercise reasonable control over its streets and to require the relocation of Detroit Edison overhead lines, the constitutional right to exercise

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<sup>49</sup> *Detroit Edison Co v Detroit*, 332 Mich 348; 51 NW2d 245 (1952); *Detroit v Michigan Bell Telephone Co*, 374 Mich 543; 132 NW2d 660 (1965).

<sup>50</sup> Electric Rules Order, Attachment B, pages 2-3.

<sup>51</sup> *Detroit Edison Co v Detroit*, 332 Mich 348; 51 NW2d 245 (1952).

<sup>52</sup> *Detroit v Michigan Bell Telephone Co*, 374 Mich 543; 132 NW2d 660 (1965).

reasonable control of its streets does not include legislatively compelling Detroit Edison to pay the extraordinary cost of relocating utility facilities underground. Due to the extraordinary cost of burying utility facilities and the impact on Detroit Edison ratepayers and shareholders, it is unreasonable for the City to shift that extraordinary cost to a utility's electric ratepayer base "for the relatively few customers to be served through underground facilities."<sup>53</sup>

The City of Taylor's ordinance will directly affect the rates of all of the customers in Detroit Edison's territory. Detroit Edison will undoubtedly seek rate relief from the MPSC to recover the extraordinary costs of burying these utility facilities. Subsequent to the Court of Appeals decision in *City of Taylor*, several municipalities have adopted similar ordinances.<sup>54</sup> As each municipality joins Taylor in passing similar ordinances, Detroit Edison, and other utilities subject to MPSC jurisdiction, will then seek rate increases from the MPSC. The activity of one municipality thus extends beyond purely local concerns, and has the very real potential to affect Detroit Edison's entire service territory. The impact of the ordinance extends far beyond the concerns of a single city and hence is not a reasonable exercise of local control.

It must be noted that, even within this comprehensive state statutory framework that regulates electric utilities, municipalities are not without recourse. Under the Transmission of Electricity Through Highways Act, Taylor could have filed a complaint against Detroit Edison to contest the relocation costs<sup>55</sup>:

The commission shall investigate each complaint against an electric utility submitted in writing by a consumer or a city, village, or township concerning the prices of electricity sold and delivered, the services rendered, or any other matter of complaint.

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<sup>53</sup> Electric Rules Order, Attachment B, page 3.

<sup>54</sup> See ordinances adopted by the City of North Muskegon and the City of East Grand Rapids. Attachment E and Attachment F, respectively.

<sup>55</sup> MCL 460.557.

Further, MCL 460.54 gives municipalities the right to file complaints with the MPSC regarding “any practice” of a utility and authorizes the MPSC to investigate and provide relief<sup>56</sup>:

[T]he municipality shall have the right to petition the commission to fix the rates and charges of said utility in accordance with the provisions of this act, or to make complaint as herein provided with reference to any practice, service or regulation of such utility, and thereupon said commission shall have full jurisdiction in the premises.

The most effective method for reconciling municipalities’ concerns regarding overhead versus underground utility facilities with the MPSC’s responsibility to regulate the provision of electric service in this State is to require the municipality to pursue statutory remedies with the Legislature.

**II. The Legislature has vested the Michigan Public Service Commission with the authority to control and supervise the business of transmitting and supplying electricity and to fix rates therefore, and the Court of Appeals erred in not recognizing the special competence of the MPSC, in failing to recognize the need for the MPSC to ensure statewide uniformity in utility matters, and in failing to appropriately apply the doctrine of primary jurisdiction in this matter.**

Under the primary jurisdiction doctrine, the Wayne County Circuit Court should have deferred this case to the MPSC. The Court of Appeals erroneously held that the primary jurisdiction doctrine did not require the Wayne County Circuit Court to defer this case to the MPSC because the specialized knowledge of the MPSC is not necessary, the need for uniformity is not a concern, “the ordinance does not conflict with the regulatory scheme” and “failure to defer to the MPSC will not have an adverse effect on the MPSC’s performance of its regulatory duties.”<sup>57</sup> MPSC respectfully requests this Court to hold that the primary jurisdiction doctrine applies to the facts of this case and remand the case to the MPSC for further proceedings.

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<sup>56</sup> MCL 460.54.

<sup>57</sup> *City of Taylor v The Detroit Edison Co*, 263 Mich App at 553-554.

The doctrine of primary jurisdiction, and its application in cases that involve the MPSC's legislatively vested authority, rules and tariffs, was most recently addressed by this Court in *Travelers Ins Co v Detroit Edison Co.*<sup>58</sup>

This Court, in *Travelers*, reversed the Court of Appeals and reinstated the Circuit Court's decision to defer that case to the MPSC because the MPSC was the administrative agency in charge of the tariff under consideration in that case.<sup>59</sup> This Court reaffirmed the definition of the primary jurisdiction doctrine, and noted that "whenever enforcement of a claim requires the resolution of issues, which, under a regulatory scheme, have been placed within the special competence of an administrative agency" the court defers the matter to the administrative agency<sup>60</sup>:

"Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the court and comes into play *whenever enforcement of the claim requires the resolution of issues* which, under a regulatory scheme, have been placed within the special competence of an administrative body; . . . .

This Court reiterated that the purpose of the primary jurisdiction doctrine is to ensure uniformity and consistency in the regulation of the businesses falling under the agencies' jurisdiction<sup>61</sup>:

By application of this doctrine, uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited function of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedures.

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<sup>58</sup> *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185; 631 NW2d 733 (2001).

<sup>59</sup> *Travelers*, 465 Mich at 194.

<sup>60</sup> *Travelers*, 465 Mich at 197-198, citing *United States v Western P R Co*, 352 US 59, 63-64; 1 L Ed 2d 126; 77 S Ct 161 (1956) (emphasis in original), citing *General American Tank Car Corp v El Dorado Terminal Co*, 308 US 422, 433; 84 L Ed 360; 60 S Ct 325 (1940) (footnote omitted).

<sup>61</sup> *Travelers*, 465 Mich at 199, citing *Far East Conference v United States*, 342 US 570, 574-575; 96 L Ed 576; 72 S Ct 492 (1952).

This Court recognized that administrative agencies are “uniquely equipped to examine the facts and develop public policy within a particular field<sup>62</sup>:

“The [primary jurisdiction] doctrine reflects the courts’ recognition that administrative agencies, created by Legislature, are intended to be repositories of special competence and expertise uniquely equipped to examine the facts and develop public policy within a particular field.”

In addition, *Travelers* acknowledged the MPSC’s well-established authority in matters involving public utilities<sup>63</sup>:

It is clear from reading the enabling statute of the MPSC that the agency’s jurisdiction extends beyond the *Valentine v [Michigan Bell Telephone Co, 338 Mich 19; 199 MW2d 182 (1972)]* Court’s purported restriction. For example, MCL 460.6 vests in the MPSC the “power and jurisdiction to regulate all rates, fares, fee, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities.” Pursuant to MCL 460.6, the MPSC is also “granted the power and jurisdiction to *hear and pass upon all matters pertaining to, necessary, or incident to the regulation of all public utilities. . . .* [Emphasis in original; citations omitted.]

This Court correctly determined that “the primary jurisdiction and control of electric utilities lies with the Public Service Commission.”<sup>64</sup>

In this case, the Court of Appeals misapplied the primary jurisdiction doctrine. The Court of Appeals failed to fully appreciate the direct effect of the City of Taylor’s ordinance on Detroit Edison rates. The Court of Appeals also grievously erred when it held that this case did not directly involve Edison’s rate structure or tariffs. A utility’s costs and expenses, particularly those associated with the extraordinary costs of burying overhead lines, will clearly have a

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<sup>62</sup> *Travelers*, 465 Mich at 198; citing Baron, *Judicial review of administrative agency rules: A question of timing*, 43 Baylor L R 139, 158 (1991).

<sup>63</sup> *Travelers*, 465 Mich at 202, n17.

<sup>64</sup> *Travelers*, 465 Mich at 195, citing *Consumers Power Co v Michigan*, 383 Mich 579, 581; 177 NW2d 160 (1972).

profound effect on Edison's rate structure and tariffs.<sup>65</sup> The Court of Appeals likewise turned a blind eye to the need for uniformity of public policy regarding the cost of burying overhead utility facilities. The Court of Appeals then compounded its error by suggesting that the uniformity that would otherwise be achieved through regulation by the administrative agency legislatively authorized to control and supervise the business of transmitting and supplying electricity, and for fixing electric rates, could be addressed "equally well through the judicial process."<sup>66</sup> Such a usurpation of executive authority by the judiciary plainly contravenes Const 1963, art 3, § 2.

The relocation of overhead electric lines is a subject that requires the specialized knowledge and expertise of the MPSC. The MPSC possesses the necessary expertise to interpret its own rules and Detroit Edison tariffs, which are paramount to the outcome of this case. Rule 460.516 expressly governs the cost of relocating overhead utility lines underground.<sup>67</sup> The Court of Appeals relied on Rule 460.517, which governs the construction of new underground utility lines.<sup>68</sup> Replacing existing overhead electric facilities underground is much different than constructing new facilities underground.<sup>69</sup> The Court's failure to recognize the distinction between relocation and new construction demonstrates why the doctrine of primary jurisdiction was developed and why it should have been employed in this case. Courts generally do not possess the necessary experience and expertise regarding the relocation of existing overhead utility lines underground, nor the financial impact of relocation on the rate structure of the

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<sup>65</sup> *City of Taylor v The Detroit Edison Co*, 263 Mich App at 555.

<sup>66</sup> *City of Taylor*, 263 Mich App at 556.

<sup>67</sup> Electric Rules Order, Attachment B.

<sup>68</sup> 1979 AC, R 460.517.

<sup>69</sup> *City of Taylor*, 263 Mich App at 564.

utility.<sup>70</sup> Detroit Edison Company's electric tariffs also directly govern the facts of this case.<sup>71</sup>

This case presents a classic example of the purpose behind the primary jurisdiction doctrine and the Wayne County Circuit Court should have deferred the case to the MPSC.

The need for uniform application of MPSC rules and Detroit Edison tariffs also support deferral of the case to the MPSC.<sup>72</sup> Where the issues raised by a plaintiff are governed by tariff, initial review by the MPSC is essential to allow the agency to exercise its regulatory function and to ensure a consistent result for similar claims.<sup>73</sup> The Court of Appeals acknowledged that this case raised concerns regarding uniformity of decision, but summarily dismissed that concern<sup>74</sup>:

There is a potential that, on the statewide level, utilities may be unsure of a municipality's ability to direct them to move their lines underground at their own expense. But uniformity can be reached equally well through the judicial process.

The MPSC has established uniformity regarding underground electric lines through Underground Electric Lines Rules, R 460.511 through R 460.519, which have existed for more than 30 years.<sup>75</sup> The Court of Appeals' analysis of other cases regarding "relocation" of utility lines does not apply to this case.<sup>76</sup> Those cases involved abandonment or removal of overhead lines from public right-of-ways and a municipality's discharge of a government function as opposed to its discharge of a proprietary function. None of the cases cited by the Court of Appeals involved the expensive relocation of properly working overhead lines underground in the same public right-of-way for the benefit of the same customers being served by the overhead

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<sup>70</sup> *Detroit v Michigan Public Service Comm*, 288 Mich 267; 286 NW2d 368 (1939).

<sup>71</sup> Electric Rules Order, Attachment B.

<sup>72</sup> *Travelers*, 465 Mich at 208; *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich 65, 76; 559 NW2d 647 (1997).

<sup>73</sup> *Travelers*, 465 Mich at 185.

<sup>74</sup> *City of Taylor v The Detroit Edison Co*, 263 Mich App at 552.

<sup>75</sup> Electric Rules Order, Attachment B.

<sup>76</sup> Detroit Edison Application, pages 22-23.

lines. None of the cases the Court of Appeals cited, involved claims that directly impact the application of a MPSC rule or a utility tariff.

The City of Taylor's cause of action against Detroit Edison arises purely out of matters anticipated by MPSC-approved tariffs, i.e., the relocation of existing overhead utility lines underground.<sup>77</sup> Matters "pertaining to, necessary, or incident to the regulation of" the public utility, are within the authority of the MPSC.<sup>78</sup> The nature of the claim in the present case is one that is explicitly "anticipated and controlled" by the jurisdiction of the MPSC. Relief from such presumptively valid tariffs must first be sought before the MPSC.<sup>79</sup>

Under the primary jurisdiction doctrine, circuit courts should defer cases regarding the relocation of properly working overhead utility lines underground in the same public right-of-way to the MPSC to ensure the uniform application of MPSC rules and tariffs and to ensure that just and reasonable rate-setting is not impacted by the cost of such projects. The MPSC is the entity legislatively charged with promoting consistent ratemaking policies and overseeing the relocation of overhead utility lines underground. Since the City of Taylor's claim is governed by matters falling within the MPSC's regulatory scheme, under the primary jurisdiction doctrine, initial jurisdiction lies with the Commission.<sup>80</sup>

Moreover, as previously noted, the MPSC's rate setting authority will be adversely affected if the MPSC's primary jurisdiction over matters regarding the relocation of utility facilities underground is not sustained in this matter. The authority to set utility rates is legislatively vested with the MPSC and the MPSC has not yet determined that the cost of

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<sup>77</sup> *Travelers Ins Co v Detroit Edison Co*, 465 Mich at 207-209.

<sup>78</sup> *Rinaldo's Construction Corp v Michigan Bell Telephone Co*, 454 Mich at 77-78.

<sup>79</sup> *Durcon Co v Detroit Edison Co*, 250 Mich App 553, 560; 655 NW2d 304 (2002).

<sup>80</sup> *Dominion Reserves Inc v Michigan Consolidated Gas Co*, 240 Mich App 216, 218-222; 610 NW2d 282 (2000), *app den* 465 Mich 889; 636 NW2d 141 (2001).



relocating existing overhead utilities underground is not justified compared to the cost of traditional overhead utility facilities.<sup>81</sup> The MPSC, in adopting Rule 460.516, recognized the Statewide importance of issues regarding the relocation of existing overhead utility lines underground, including the rate impact on utility customers.<sup>82</sup>

In 1996, this Court concluded that the cost of relocating, insulating, or de-energizing power lines for third parties interfered with the public policy consideration of providing reasonable cost electric power<sup>83</sup>:

The social policy at issue is the public's need for electric power at a reasonable cost. To impose a duty to relocate, insulate, or de-energize power lines whenever third parties construct buildings near power lines would interfere with this policy. The cost of insulating or moving these lines would be significant. Edison alone has over 35,000 miles of power lines in this state. To impose the duty the plaintiffs [sic] request would certainly amount to a huge cost that would be passed on the consuming public. Furthermore, it may often be impossible for Edison and other power companies to move power lines away from new construction without moving them closer to preexisting structures. In any event, the costs of injuries such as those suffered by these plaintiffs will have to be met in another societal forum.

Notwithstanding the MPSC's expertise regarding the relocation of overhead utility lines underground and the MPSC's exclusive authority to set just and reasonable rates for electricity, the Court of Appeals concluded that the regulatory scheme will not be "thrown out of balance" by failing to apply the primary jurisdiction doctrine<sup>84</sup>:

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<sup>81</sup> Electric Rules Order, Attachment B.

<sup>82</sup> Electric Rules Order, Attachment B.

<sup>83</sup> *Groncki v Detroit Edison Co*, 453 Mich 644, 661-662; 557 NW 2d 289 (1996).

<sup>84</sup> *City of Taylor v The Detroit Edison Co*, 263 Mich App at 552.

This is not a situation where a pervasive regulatory scheme is thrown out of balance. The ordinance does not conflict with the regulatory scheme. Given that the regulatory scheme of the MPSC is not thrown out of balance, this case does not have significant effect on the MPSC's performance to require deference to it.

The Court of Appeals' conclusions in this regard are patently at odds with this established precedent interpreting clear, unequivocal legislative directives to the contrary. The failure of the Court of Appeals to recognize the MPSC's primary jurisdiction in this case will cripple the MPSC's statutory authority to set just and reasonable rates.

### **Conclusion and Relief**

The Court of Appeals decision below is contrary to this Court's decisions interpreting Const 1963, art 7, § 29, that limit a municipality's control of its streets to matters of purely local concern. The matter of burying overhead electric lines is not a matter of local concern, unique to the City of Taylor. Requiring a utility to bear these extraordinary costs will have a direct and substantial effect on a utility's rate structure and tariffs, matters that have been specifically entrusted to the specialized knowledge of the MPSC by the Legislature. The Court of Appeals decision to transfer this function to the judiciary not only violates Const 1963, art 3, § 2, but also

portends a Byzantine set of ordinances, each varying by municipality, in place of the MPSC's uniform, State-wide regulation that currently exists.

The Court of Appeals decision below should be reversed.

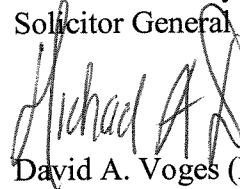
Respectfully submitted,

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